

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2115

Cir. Ct. No. 2012CV225

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PHILIP BLANK,

PLAINTIFF-APPELLANT,

BEATRICE BLANK,

PLAINTIFF,

v.

**CLINTONVILLE MINI MART d/B/A AMRALA ENTERPRISES, INC.,
WEST BEND MUTUAL INSURANCE COMPANY
AND AZURE ENTERPRISES, LLC,**

DEFENDANTS-RESPONDENTS,

**DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED HEALTHCARE
INSURANCE COMPANY AND AIR FORCE CLAIMS & TORT LITIGATION
DIVISION,**

SUBROGATED DEFENDANTS.

APPEAL from a judgment of the circuit court for Waupaca County:
PHILIP M. KIRK, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. This case concerns a personal injury action filed by Philip Blank after he allegedly tripped on a “joint” between two slabs of concrete near a gas pump at Clintonville Mini Mart in May 2010 and injured his wrist.¹ A jury found neither Blank nor Mini Mart negligent. Blank appeals the judgment entered upon the jury verdict. Blank argues that the circuit court erred in excluding photographs and measurements taken at Mini Mart in 2013 and 2014. For the reasons set forth below, we conclude that the circuit court did not err. Therefore, we affirm.

BACKGROUND

¶2 Blank alleged that after refueling his car at Clintonville Mini Mart in May 2010, he took about two steps, tripped on an uneven joint between two concrete slabs, landed on his right arm, and injured his right wrist.

¶3 Blank returned to Mini Mart approximately ten days after he sustained the injury to his wrist, and took three photographs of the uneven joint on which he allegedly tripped.

¹ In this opinion, “joint” refers to the location where two slabs of concrete meet.

Also in this opinion, “Blank” refers to Philip. Philip’s wife, Beatrice, was also a plaintiff in this case, but her claims were extinguished by law due to her passing in 2014. For ease of discussion, we use “Blank” to refer to Philip as if he is the lone plaintiff.

¶4 In May 2012, Blank filed a complaint against Mini Mart, alleging that Mini Mart’s negligence caused him personal injury, and seeking damages and statutory costs.

¶5 In preparation for trial, both parties hired experts with engineering backgrounds to inspect the Mini Mart property. Both experts took photographs and obtained measurements of the uneven joint during their inspections in September and October 2013. Mini Mart’s expert took additional photographs and obtained additional measurements in April 2014. Two days before trial, Mini Mart filed a motion *in limine* to exclude the pictures and measurements from the 2013 and 2014 inspections. Over Blank’s objection, the circuit court granted the motion and excluded the photographs and measurements from 2013 and 2014.

¶6 The case was tried to a jury in May 2014. After the jury returned its verdict finding neither Blank nor Mini Mart negligent, Blank filed a post-verdict motion for a new trial, arguing that the court erroneously exercised its discretion by excluding the 2013 and 2014 photographs and measurements. The circuit court held a hearing and denied the motion. Judgment was then entered on the verdict in favor of Mini Mart.

DISCUSSION

¶7 On appeal, Blank renews his argument that the circuit court “erred” in granting the motion *in limine* excluding the 2013 and 2014 photographs and

measurements.² Blank argues that the circuit court “erred,” because “[a]ll that the law requires is a proper foundation to admit photographs into evidence based on testimony that they accurately depict the scene of the injury at the time that it occurred ... which Philip [Blank] has provided through the testimony of” Mini Mart’s owner, a Mini Mart employee, Mini Mart’s expert, and Blank’s expert.

¶8 Blank’s argument disregards the highly deferential standard of review applicable here and is premised upon both a misunderstanding of Wisconsin case law and an inaccurate depiction of the evidence. In the sections that follow, we first state the applicable standard of review. We then apply that standard of review to the circuit court’s decision to exclude the 2013 and 2014 photographs and measurements. Finally, we address and reject Blank’s argument as to why the circuit court erred.

A. Standard of Review

¶9 “We review a circuit court’s decision to admit or exclude evidence under an erroneous exercise of discretion standard. In making evidentiary rulings, the circuit court has broad discretion.” *Martindale v. Ripp*, 2001 WI 113, ¶28,

² Blank suggests that a separate argument is that the circuit court erred in excluding Blank’s expert’s 2013 photographs and measurements “when offered into evidence during the trial.” However, he does not explain how this argument is analytically distinct from the argument we address as to the court’s exclusion of the 2013 and 2014 photographs and measurements in granting Mini Mart’s motion *in limine*. Therefore, we do not address it separately.

Blank also appears to argue that Mini Mart’s motion *in limine* was untimely and that a new trial should be granted because of “errors in trial” and “in the interest of justice.” However, Blank, fails to develop either of these arguments, and therefore, we do not consider them further. See *Techworks, LLC v. Wille*, 2009 WI App 101, ¶27, 318 Wis. 2d 488, 770 N.W.2d 727 (“[W]e will not address arguments that are not developed.”); see also *Industrial Risk Insurers v. American Eng’g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (“Arguments unsupported by legal authority will not be considered, and we will not abandon our neutrality to develop arguments.” (citations omitted)).

246 Wis. 2d 67, 629 N.W.2d 698 (citations omitted). “As with other discretionary determinations, this court will uphold a decision to admit or exclude evidence if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion.” *Id.*

¶10 ““The question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the [circuit] court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. The test is not whether this court agrees with the ruling of the [circuit] court, but whether appropriate discretion was in fact exercised.”” *Id.*, ¶29 (citation and quoted source omitted).

B. The Circuit Court’s Discretionary Decision to Exclude Photographs and Measurements Taken in 2013 and 2014

¶11 We now turn to the circuit court’s decision to exclude the 2013 and 2014 photographs and measurements.

¶12 Gleaning from the circuit court’s statements before, during, and after the jury trial, we understand that the circuit court based its decision to exclude the 2013 and 2014 photographs and measurements on the premise that the only material image before the jury was the image of the condition of the Mini Mart property as it existed in May 2010, when the trip and fall incident allegedly occurred:

There’s only one piece of property that is really at issue here. That’s the property of the mini mart in May of 2010.

....

... We’re focusing on what the condition of the property was in May of 2010, and we have plenty of testimony in the record at that point already. I don’t care that [the expert] went out and took measurements of what it

is now, because I don't care what it is now. I only care what it was in May of 2010.

¶13 Based on that premise, the court reasoned that the 2013 and 2014 photographs and measurements were too remote in time from the incident in 2010:

With respect to the photos first, ... nobody got out there to take measurements in 2010 That's the way [it] goes. But to admit pictures that show what the slabs or crack in the slabs look like from 2013 and 2014, whatever they are, is too attenuated based upon time to allow those in, in my opinion.

¶14 Consistent with the standard of review set out above, the decision to allow or exclude photographs “is a matter of judicial discretion.” *Featherly v. Continental Ins. Co.*, 73 Wis. 2d 273, 283, 243 N.W.2d 806 (1976). “We need not agree that the [circuit] judge correctly excluded these photographs, but the question is one of the [circuit] judge’s discretion.” *Id.* “It is discretionary with the [circuit] court to admit photographs to aid the jury in securing a clear idea of a material situation when the photographs better show that situation than does the testimony of witnesses.’ But where photographs are not substantially necessary or instructive to show material facts or conditions ... or divert the minds of the jury to improper or irrelevant considerations, they should be excluded.” *Gustin v. Johannes*, 36 Wis. 2d 195, 204, 153 N.W.2d 70 (1967) (quoted source omitted).

¶15 Here, the 2013 and 2014 photographs and measurements were taken more than three years after the alleged trip and fall incident occurred in May 2010. As we explain in the next section, Blank failed to present evidence that the joint between the concrete slabs remained the same between May 2010 and September/October 2013 and April 2014. Thus, the court reasonably concluded that presenting to the jury photographs and measurements taken more than three years after the incident carried a significant risk of diverting their minds to

irrelevant considerations—specifically, the condition of the Mini Mart property as it existed in 2013 and 2014.

¶16 In addition, as the circuit court recognized, Blank presented contemporaneous evidence in the form of his own photographs and testimony to illustrate what the joint looked like in May 2010. Blank had taken three photographs within two weeks of the incident. Those three photographs were admitted into evidence and depicted the joint, specifically the portion of the joint where Blank allegedly tripped, as it existed in 2010. Blank also gave testimony at trial suggesting the extreme condition of the joint in 2010, stating:

I've driven in 49 of the 50 states. I never saw a differential in height between two slabs of concrete as big as that one was.

Given the admission of photographs taken within two weeks of the incident in 2010 and Blank's own testimony about the condition of the joint at the time of the incident in 2010, the 2013 and 2014 photographs and measurements were not “substantially necessary or instructive to show material facts or conditions.” *See Gustin*, 36 Wis. 2d at 204.

¶17 This court “will uphold a decision to admit or exclude evidence if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion.” *Martindale*, 246 Wis. 2d 67, ¶28. We conclude that the circuit court examined the relevant facts, applied a proper legal standard, used a demonstrated rational process, and reached a reasonable conclusion, and therefore, the circuit court did not err in excluding the 2013 and 2014 photographs and measurements. We address Blank's argument to the contrary next.

C. Blank's Argument That the Circuit Court Erred Because Blank Established a Proper Foundation to Admit the 2013 and 2014 Photographs into Evidence

¶18 Blank argues that the circuit court erred in excluding the 2013 and 2014 photographs and measurements because “[a]ll that the law requires is a proper foundation to admit photographs into evidence.” We understand Blank to be arguing that if he presented testimony asserting that the 2013 and 2014 photographs and measurements depicted the joint as it existed in May 2010, the court was *required* to admit the 2013 and 2014 photographs and measurements. There are two problems with Blank’s argument. First, Blank’s argument is premised on a misunderstanding of a Wisconsin case from more than a century ago, *Mahar v. Montello Granite Co.*, 146 Wis. 46, 130 N.W.2d 949 (1911). Second, Blank fails to point to testimony plainly asserting that the 2013 and 2014 photographs and measurements accurately depicted the joint as it existed in May 2010.

¶19 First, Blank misinterprets *Maher* as imposing a bright line rule that is contrary to the exercise of discretion standard set in subsequent case law. In *Maher*, our supreme court held that a circuit court did not err in admitting certain photographs, where it was unknown when the photographs were taken, because there was “ample evidence going to show that [the photographs] are correct representations of the premises at the time of the injury, and, if so, it was not very material when they were taken.” 146 Wis. at 51-52. The court in *Maher* did not establish a strict formula, as Blank seems to suggest, with the input being the presentation of evidence that certain photographs accurately depict the premises at the time of the incident, and the output being a mandate that those photographs be admitted into evidence. To the contrary, our supreme court clarified in subsequent

cases that whether photographs should be admitted is largely a matter of the circuit court's discretion without any restricting general formula:

[W]hen there is a question whether a picture might or might not be used advantageously and properly in placing the facts before the jury, the answer to the question “must vary with one case and another, and we think the decision in each case must be left *largely to the judgment and discretion of the presiding judge, without any restricting general formula.*”

Wagner v. Peiffer, 259 Wis. 566, 571-72, 49 N.W.2d 739 (1951) (emphasis added) (quoted source omitted); *see also Featherly*, 73 Wis. 2d at 283; *Gustin*, 36 Wis. 2d at 204. Thus, Blank fails to persuade us that the decision whether to admit photographs is a special category of evidentiary decision that is subject to a standard other than that which we have described above.

¶20 Second, Blank fails to show that he established before the circuit court that the 2013 and 2014 photographs did in fact accurately depict the joint as it existed in May 2010. Blank relies on testimony by Mini Mart's owner, a Mini Mart employee, Mini Mart's expert, and Blank's expert for support. However, as we explain below, their testimony did not establish that the joint between the two slabs of concrete had not changed since May 2010.

¶21 Blank points first to Mini Mart's owner's deposition testimony that the concrete was “the same” during the ten years that he owned the property. However, the testimony that Blank points to is Mini Mart's owner's twice stated assertion, “The same,” in response to questions about the general appearance of the concrete as a whole over the ten years that he owned the property. There was no mention of the uneven joint during that part of the deposition. Mini Mart's owner's general statement about the appearance of the concrete as a whole does

not suffice to establish that the uneven joint in particular had not changed over the ten years prior to 2013.

¶22 Blank next points to trial testimony by a long-time Mini Mart employee that the “front of [the] convenience store” as shown in a 2013 photograph (which was shown to the employee but not admitted into evidence) “appear[ed] to be as it looked in May of 2010.” The employee also testified that during the time that she worked at Mini Mart, there had been no work done on the concrete slabs. However, like Mini Mart’s owner, the employee was never asked whether the joint, specifically the height differential, was the same in 2013 as it was in 2010.

¶23 Third, Blank points to deposition testimony by Mini Mart’s expert about his measurements of the joint during his 2013 inspection of the property and asserts that the expert “never once qualified his measurements based on time or that they may not have accurately reflected the condition of the [Mini Mart] property at the time of Blank’s injury.” However, as far as we can tell, Mini Mart’s expert was never asked to qualify his 2013 measurements based on time. Moreover, Blank identifies no part of the expert’s testimony, in his deposition or at trial, where he opined that the 2013 measurement of the joint was the same as what the joint measured in 2010.

¶24 Finally, Blank refers generally to his own expert’s testimony as laying a proper foundation for admission of the 2013 and 2014 photographs and measurements. However, in his deposition, Blank’s expert testified that he “could not offer an opinion that the joint appear[ed] any differently [in the 2010 photographs] than in the photos [he] took [in October 2013].” Blank points to no

testimony by his own expert supporting the assertion that the joint had not changed between May 2010 and October 2013.

¶25 In sum, Blank fails to establish that the 2013 and 2014 photographs and measurements accurately depicted the joint as it existed on the day of Blank's incident in 2010. Because Blank fails to identify any other basis for us to conclude that the circuit court erroneously exercised its discretion in excluding the 2013 and 2014 photographs and measurements, we affirm.

CONCLUSION

¶26 For the reasons set forth above, we conclude that the circuit court did not erroneously exercise its discretion in excluding the 2013 and 2014 photographs and measurements. Therefore, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

